

DATE: March 9, 2009

MEMORANDUM TO: Ronald K. Lorentzen
Acting Assistant Secretary
for Import Administration

FROM: John M. Andersen
Acting Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Results of 4th
Administrative Review and 2nd New Shipper Review: Certain
Frozen Fish Fillets from the Socialist Republic of Vietnam
("Vietnam")

SUMMARY

We have analyzed the case and rebuttal briefs submitted by Petitioners,¹ QVD,² An Xuyen³ and South Vina,⁴ in the antidumping duty administrative and new shipper reviews of certain frozen fish fillets from Vietnam. The Department of Commerce ("Department") published its preliminary results in these antidumping duty administrative and new shipper reviews on September 8, 2008. See Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Notice of Preliminary Results of the New Shipper Review and Fourth Antidumping Duty Administrative Review and Partial Rescission of the Fourth Administrative Review, 73 FR 52015 (September 8, 2008) ("Preliminary Results"). The period of review ("POR") is August 1, 2006, through July 31, 2007. Following the Preliminary Results and an analysis of the comments received, we made changes to the margin calculations. We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum. Below is a complete list of issues for which we received comments and rebuttal comments by parties:

COMMENT 1: SURROGATE FINANCIAL RATIOS

A. Bionic⁵
B. Gemini⁶

¹ Catfish Farmers of America and individual U.S. catfish processors ("Petitioners").

² QVD Food Company ("QVD").

³ An Xuyen Company Ltd. ("An Xuyen").

⁴ Southern Fishery Industries Company, Ltd. ("South Vina").

⁵ Bionic Sea Food ("Bionic").

⁶ Gemini Sea Food Ltd. ("Gemini").

COMMENT 2: SURROGATE VALUE FOR WHOLE LIVE FISH
COMMENT 3: SURROGATE VALUE FOR BROKEN FILLETS
COMMENT 4: INFLATORS FOR CERTAIN FACTORS OF PRODUCTION
COMMENT 5: QVD

- A. QVD'S U.S. SALES DATA
- B. INTERNATIONAL FREIGHT CALCULATION
- C. DUTY ABSORPTION
- D. COLLAPSING QVD/DONG THAP AND THUAN HUNG
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- C. TOTAL MATERIALS COST FOR CERTAIN CHEMICALS

COMMENT 9: BINH AN

- A. BONA FIDE SALES
- B. INTERNATIONAL FREIGHT
- C. DIESEL
- D. ELECTRICITY

DISCUSSION OF THE ISSUES

COMMENT 1: SURROGATE FINANCIAL RATIOS

A. BIONIC

Petitioners argue that the Department should calculate the surrogate financial ratios using the financial statements of Apex Foods Ltd. ("Apex") and Bionic because both companies meet the criteria for surrogate values because both: (1) are located in the primary surrogate country, Bangladesh; (2) process and export seafood products; (3) issued financial statements closely approximating the POR (i.e., contemporaneous); and (4) have publicly available financial statements.

With respect to Bionic, Petitioners argue that the Department should reverse its decision to exclude the financial statements of zero profit companies in the calculation of surrogate financial ratios. Petitioners maintain that the fact that a company does not have a positive profit does not, by itself, mean that its overhead and selling, general and administrative ("SG&A") expenses are not representative of the experience of the industry as a whole. On the contrary, Petitioners argue, overhead and SG&A expenses are calculated independently of profit, and the overhead

and SG&A expenses incurred by zero profit companies are included in the overhead and SG&A of the industry as a whole. Petitioners contend that the relationship between profit and expenses creates no rational distinction between zero and positive profit companies because the expenses and profit status of a company are always interconnected. Petitioners argue that the Department's approach is devoid of logic as it would exclude a company with \$1 loss but include one with a \$1 profit. Petitioners maintain that although expenses may affect whether a company has a positive or zero profit, they are not the sole bottom-line determinants of profitability.

Petitioners state that although Bionic posted zero profit in 2005, Bionic: (1) earned positive gross profits in five of the prior six fiscal years; (2) issued its 2005 audited financial statements attesting to the continued operation of the company as an ongoing concern that continued to generate substantial revenues; and, (3) made no suggestion of any factory shutdowns or curtailed operation, and thus still had reliable and representative SG&A and overhead costs.

Finally, Petitioners argue that it has been the Department's consistent practice to use the financial statements of zero/negative profit companies in the calculation of surrogate financial ratios. For example, Petitioners argue that in Wooden Bedroom Furniture, the Department only disregarded the unprofitable companies for purposes of calculating the profit ratio, but included their financial ratios in the calculation of the surrogate overhead and SG&A ratios. See Final Determination of Sales at Less Than Fair Value: Wooden Bedroom Furniture From the People's Republic of China, 69 FR 67313 (November 17, 2004) ("Wooden Bedroom Furniture"), and accompanying Issues and Decision Memorandum at Comment 3. In addition, Petitioners state that the practice of excluding a company's financial information from the calculation of the profit ratio while including the company's financial statements to calculate average overhead and SG&A ratios has been consistently upheld by the Court of International Trade.⁷

QVD argues that contrary to Petitioners' claims, the Department's policy to disregard zero profit financial statements was well reasoned and cited specific evidence from the financial experience of Bionic itself. QVD maintains that Petitioners' assertion that a company's profit has no connection to its other ratios is directly contradicted by other claims in their brief.⁸ Thus, QVD argues, Petitioners' own argument acknowledges a connection between profit and a company's other financial ratios. QVD further argues that since constructed value in a market economy environment requires a positive profit, it is completely reasonable and appropriate for the Department to limit its consideration for surrogate financial ratios to those companies that are currently reflecting a profit in their financial statements. South Vina adds that if a company lacks profit, it does not represent the industry as a whole, since no industry can exist without profits. In addition, South Vina argues that a lack of profit may be due to uncharacteristically high overhead and/or SG&A expenses, which, again, may not be indicative of industry-wide experience.

QVD argues that Petitioners' claim that the Department's decision to disregard zero profit financials conflicts with its prior policy of accepting zero profit financials is incorrect. QVD states that the Department noted, when adopting its current policy, that its prior practice had been

⁷ See e.g., Rhodia, Inc. v. United States, 240 F. Supp. 2d 1247, 1253 (2002); see also Fuyao Glass Indus. Group Co. v. United States, 27 C.I.T. 1892, 1911-14 (2003).

⁸ See Petitioners' Case Brief at p.22, note 62.

inconsistent and that while in some prior cases the Department included financial data of unprofitable companies, it also rejected financial statements of unprofitable companies in other cases.⁹

Finally, QVD argues that notwithstanding the Department's policy to disregard zero-profit financials, it would be improper to use the 2005 Bionic financial in this review because it is not contemporaneous with the POR as compared to those from Apex and Gemini.

Department's Position:

In Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results of Antidumping Duty Administrative Review and Partial Rescission, 73 FR 15479 (March 24, 2008) ("Fish 3rd AR Final"), the Department acknowledged that our past practice regarding inclusion of companies with zero/negative profit had been inconsistent, but clearly articulated its preference. See Fish 3rd AR Final at Comment 1A (citing Shrimp from Vietnam¹⁰ at Comment 2B). Consistent with this clarification, the Department preference for all future cases is to use the financial statements of companies that have earned a profit and disregard the financial statements of companies that have zero profit when there are other financial statements that have earned positive profit on the record.

As articulated in prior cases, such as Silicon Metal from Russia, "a company's profit amount is a function of its total expenses and, therefore, is intrinsically tied to the other financial ratios for that company". See Notice of Final Determination of Sales at Less Than Fair Value: Barium Carbonate From the People's Republic of China, 68 FR 46577 (August 6, 2003) and accompanying Issues and Decision Memorandum at Comment 6 (stating that it is the Department's preference not to use any of the financial information from a given year during which a company experienced a loss. . . In this case, the Department has information on the record for another company, Athiappa Chemicals, that did not experience a loss.); see also Silicon Metal from Russia and accompanying Issues and Decision Memorandum (disregarding the financial statement for Sinai Manganese because it experienced a negative profit and noting that the Department has previously rejected companies with zero or negative profit in favor of profitable companies); Persulfates from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 64 FR 69494 (December 13, 1999). Moreover, there is information on the record supporting this general principle. For example, Bionic noted in its Director's Report that "{u}nless the renewal of full amount of credit is done on due date the company would continue to suffer with lower production and exports. . ." See Memorandum to the File: Antidumping Duty Administrative and New Shipper Reviews of Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Surrogate Values for the Preliminary Results, dated February 28, 2007 at Exhibit 12. Accordingly, we find that the use of parts of the financial statements of a zero profit company does not account for the interconnectedness of the overhead and SG&A with the zero profit.

⁹ See Notice of Final Determination of Sales at Less Than Fair Value: Silicon Metal From the Russian Federation, 68 FR 6885 (February 11, 2003) ("Silicon Metal from Russia") and accompanying Issues and Decision Memorandum at Comment 10.

¹⁰ See Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Final Results of the First Antidumping Duty Administrative Review and First New Shipper Review, 72 FR 52052 (September 12, 2007) ("Shrimp from Vietnam"), and accompanying Issues and Decision Memorandum at Comment 2(B).

In the instant review, the surrogate company under consideration, which was also the company under consideration in Shrimp from Vietnam and Fish 3rd AR Final, is Bionic. Because there is a financial statement on the record of this review from a company which did earn a profit, Apex, consistent with our preference articulated in Fish 3rd AR Final and Shrimp from Vietnam, we continue to disregard Bionic's financial statements in our calculation of surrogate financial ratios. Moreover, we agree with QVD that Bionic's financial statements are not contemporaneous with the POR, thereby also eliminating it as the best available information given the contemporaneous statement from Apex.

B. GEMINI

Petitioners state that sufficient information exists on the record of this review to demonstrate that Gemini received payments contingent on exports in 2006-2007, which would render these subsidies countervailable under U.S. law. Petitioners speculate that the Department used Gemini's 2007 Annual Report in the Fish 3rd AR Final because the Department had not found the subsidy listed in Gemini's financial statements to be countervailable in any prior Bangladeshi countervailing duty ("CVD") proceeding.¹¹ Moreover, Petitioners argue that in valuing the factors of production ("FOP"), the Department should avoid using any prices which it has reason to believe or suspect may be dumped or subsidized prices and that a previous CVD investigation of the subsidy is not requisite.¹²

Petitioners maintain that although the Department has previously disqualified financial statements that contained a subsidy the Department had previously found to be countervailable, the Department did not in that case create a per se rule of only excluding financial statements if formal CVD proceedings had been completed. See Freshwater Crawfish Tail Meat from the People's Republic of China: Notice of Final Results And Rescission, In Part, of 2004/2005 Antidumping Duty Administrative and New Shipper Reviews, 72 FR 19174 (April 17, 2007) ("Crawfish from China"), and accompanying Issues and Decision Memorandum at Comment 1. Petitioners claim that in the Fish 3rd AR Final, the Department (citing Shrimp from Vietnam) indicated that it would disqualify a surrogate producer's financial statement if it contains evidence of a subsidy that the Department will normally deem countervailable. Petitioners contend that the Department did not, however, state that it must have completed a formal CVD investigation in the country of the potential surrogate producer because it will consider excluding financial statements containing evidence of subsidies. Moreover, Petitioners argue that the Department has conducted only a single CVD case against Bangladesh involving Shop Towels from Bangladesh¹³ and that because this decision pre-dated the subsidy program at issue, the Department did not have an opportunity to evaluate it in the context of this previous investigation. Petitioners argue that Gemini would not have been profitable during 2006-2007 but for the 10% export subsidies, as Petitioners claim, Gemini treats the government subsidies as "turnover" in its normal accounting system. Accordingly, Petitioners maintain that without the subsidies, Gemini would have posted a loss before taxes. Thus, Petitioners argue that these

¹¹ Fish 3rd AR Final at Comment 1.B.

¹² H.R. Conf. Rep. No. 100-576 at 590 (1988), reprinted in 1988 U.S.C.C.A.N. 1547, 1623 (emphasis added) ("House Report").

¹³ See Final Negative Countervailing Duty Determination: Shop Towels from Bangladesh, 56 FR 29941 (July 1, 1991).

significant export subsidies impacted Gemini's business operations and overall financial data, which render its financial statements unrepresentative and unsuitable for use.

QVD argues that the Department has repeatedly stated that with regard to subsidies in financial statements, it will only exclude the financial statements of companies that receive actionable countervailable subsidies. QVD maintains that in Off-Road Tires¹⁴ the Department considered several financial statements with varying indications of subsidization and excluded two financial statements containing evidence of subsidies which the Department found to be countervailable. See Off-Road Tires, at Comment 17A. QVD argues that in considering three other financials that contained evidence of subsidies, but without record evidence of actionable subsidies, the Department did not reject the financial statements. Id.

QVD notes that there are also two cases which specifically discuss this policy as applied to Gemini's financial statements.¹⁵ In one of those cases, Fish 3rd AR Final, QVD claims that the Department examined this exact issue and considered the Gemini financials under its established policy and found that it is acceptable for surrogate ratio calculations. See Fish 3rd AR Final, at Comment 1B. Accordingly, QVD argues that the relevant facts and record evidence in this review are identical and warrant the same conclusion.

QVD argues that Petitioners' contention that the Department does not have a per se rule of only excluding financial statements if formal CVD proceedings have been completed is incorrect. In Shrimp from Vietnam and other cases, the Department rejected their argument that the rule was a per se rule. The determination will depend on the facts of each case. Therefore, QVD argues, the Department has already found that the Gemini financial statement does not contain sufficient evidence of any actionable subsidies, and accordingly, the Department should continue to use the Gemini financial statements in the surrogate financial ratio calculation for the final results.

Department's Position:

Petitioners argue that the Gemini financial statements should not be considered for surrogate financial ratios because there is a reason to believe or suspect that Gemini received a subsidy. One of the criteria to evaluate in determining what is the best available information in valuing the FOP is whether there is a reason to believe or suspect that prices being used may be dumped or subsidized. See House Report. The House Report further explains that a formal CVD investigation is not required in making the determination and that the Department should base its decision on the available record evidence. Id. at 1623-24. Congress provided no further guidance as to what would constitute a reasonable basis to believe or suspect that a price may be subsidized. As a result, Congress left the determination to the Department's discretion.

The Department has exercised its discretion in deciding what constitutes a reasonable basis to believe or suspect that a value may be subsidized. For example, if a financial statement contains

¹⁴ See Certain New Pneumatic Off-The-Road Tires from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances, 73 FR 40485 (July 15, 2008) ("Off-Road Tires") and accompanying Issues and Decision Memorandum at Comment 17A.

¹⁵ See Shrimp from Vietnam, Issues and Decision Memorandum at Comment 2C, and Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results of Antidumping Duty Administrative Review and Partial Rescission, 73 FR 15479 (March 24, 2008) and accompanying Issues and Decision Memorandum at Comment 1B.

a reference to a specific subsidy program that the Department found countervailable in a formal CVD determination, that would constitute a reasonable basis to believe or suspect that the prices may be subsidized. See e.g., Fish 3rd AR Final at Comment 1B (citing Crawfish from China); Off-Road Tires at Comment 17A. However, the Department has also explained that where there is a mere statement in a financial statement that a subsidy was received, and for which there is not additional information as to the nature of such as a potential subsidy, the Department would determine that there was insufficient evidence to support a finding that there is a reasonable basis to believe or suspect that the company has received a subsidy. Id.

In this case, Petitioners argue a “10% cash subsidy as per Bangladesh Bank Circular No. FE-23 dated 12/12/03 against export bill” was made available to Gemini. See Petitioners’ Case Brief dated February 3, 2009. However, absent further specific information, such as evidence that this statement refers to program previously found by the Department to provide a countervailable subsidy, we cannot conclude that Gemini’s 2006/2007 financial statements are unsuitable for calculating surrogate financial ratios. As a result, the Department will continue to include Gemini’s 2006/2007 financial statements in the calculation of surrogate financial ratios. Finally, we note that no party has challenged the use or appropriateness of Apex’s financial statements, and thus, we have averaged Gemini with Apex in the calculation of surrogate financial ratios for these final results.

COMMENT 2: SURROGATE VALUE FOR WHOLE LIVE FISH

Petitioners argue that the Department should value whole live fish using the 2000-2001 rather than the 2006-2007 financial data from Gachihata Aquaculture Farms, Ltd. (“Gachihata”). Petitioners argue that the 2006-2007 Gachihata price is based on a commercially insignificant quantity of sales. Petitioners note that the quantity of fish sold in the period covered in the report is far below the levels from prior years. The 2000-2001 price was based on sales of 115.5 metric tons, while the 2006-2007 prices are based on sales of six metric tons. Petitioners cite to cases where the Department has rejected the most contemporaneous data on the record for a surrogate value when the sales volume is found to be “aberrationally low.” Petitioners also argue that the Gachihata 2006-2007 price is an unreliable surrogate value because the quantity of *pangas* fish was sold at a loss. Petitioners argue that Gachihata suffered operating losses during this period, and that the 2006-2007 financial statements clearly show that Gachihata sold fish at below costs. Furthermore, Petitioners argue that the Department’s practice is to disregard potential surrogate values that are aberrational or otherwise outside the ordinary course of trade, and fish sold below the cost of manufacturing should not be used for the purposes of valuing whole live fish as the sales are outside the ordinary course of trade.

Petitioners also discredit the 2006-2007 financial statement because the Director’s Report states that (a) the financial condition of the company had continued to deteriorate from prior years, (b) the Bangladeshi Government refused to provide financial assistance to overcome the company’s losses despite Gachihata’s pleas, (c) the company defaulted on bank loans due to cash flow, (d) the Bangladeshi SEC imposed penalties on the company directors for securities violations, (e) production of the company was at all-time lows because of shortage in working capital and operating losses.

Petitioners also argue that using the 2006-2007 Gachihata price is inconsistent with decision to exclude Bionic's financial data from surrogate financial ratios. Petitioners note that in recent segments of this proceeding, the Department excluded the financial data of another Bangladeshi seafood processor from the calculation of the surrogate financial ratios as the company was found to be unprofitable. Petitioners argue that if the Department continues to exclude financial ratios because a company was unprofitable, then it should not then accept a surrogate value derived from Gachihata's 2006-2007 financial statements, as Gachihata suffered operating losses during that time. Next, Petitioners argue that Gachihata's accounting practices from 2002 onward are questionable and that this undermines the reliability of each annual report issued since 2002. Petitioners placed on the record a number of articles that question Gachihata's accounting practices from 2002 onward. Furthermore, Petitioners argue that Gachihata's auditors were limited by the fact that biological assets had not been "recognized, measured, and presented" during the period—they had last been valued in 2003. Therefore, Petitioners argue that given each of the above-mentioned concerns, the Gachihata 2000-2001 price is the best available information on the record, despite the 2006-2007 information being more contemporaneous.

QVD, South Vina, and Binh An argue that the Department should continue to use prices from the 2006-2007 Gachihata financial statement rather than the 2000-2001 financial statement in determining the surrogate value for the whole fish input. QVD, South Vina, and Binh An argue that there is no evidence that the reported sales of *pangas* by Gachihata were commercially insignificant. In the past, when the Department has determined certain quantities to be too small to be used in surrogate values, the product has been one where the per-unit value is substantially different from the per-unit values of larger quantity exports. QVD, South Vina, and Binh An also argue that the Department does not have a practice of conducting a below-cost analysis for surrogate values in non-market economy ("NME") cases. Furthermore, there is no record of actual production costs associated specifically to *pangas*. QVD, South Vina, and Binh An contend that the only issue is whether the fish was sold at a market price and there is no evidence that these sales were below market prices.

QVD, South Vina, and Binh An argue that there is no consistency in disregarding zero profit financials for surrogate ratios and extending that practice to the valuation of specific inputs. QVD, South Vina, and Binh An assert that the financial statements do not provide enough information to draw conclusions about a specific product. QVD, South Vina, and Binh An argue that a company may experience a loss in one area, but be profitable with another. Furthermore, they argue that the analysis is whether the price is reflective of the general market price for the product and there is no evidence that the price was outside the general market price. QVD, South Vina, and Binh An contend that nothing on the record casts doubt on the reliability of the *pangas* price contained in the 2006-2007 financial statement. Furthermore, QVD, South Vina, and Binh An note that the financial statement was reviewed by auditors who did not indicate the same concerns that they had listed in prior years. Finally, QVD and Binh An argue that the only reason the company did not update the value of its biological assets was because the company does so every five years, and this was not the year that it did this.

QVD and Binh An argue that Petitioners offer no valid reason to disregard the contemporaneous 2006-2007 financial statements from Gachihata, nor do they offer any record evidence that the 2000-2001 fish value is the best available information. QVD and Binh An state that the value in

2000-2001 is the highest fish value on the record, and that the price has been steadily declining. Therefore, QVD and Binh An argue that it would be inappropriate to use the 2000-2001 value and then inflate it an additional 44% to arrive at a whole fish surrogate value when the 2006-2007 value is on the record.

On February 25, 2009, the Department conducted a public and a closed hearing. On March 3, 2009, the Department placed additional information on the record. Petitioners and QVD submitted comments regarding this additional information on March 5, 2009. Citing court cases, the Department's regulations and prior Department determinations, Petitioners argue that the inclusion of the FAO study on the record violates their due process rights. With respect to the FAO Report, Petitioners identified certain areas of FAO study that were of concern: (1) respondents were not convinced as to the legitimacy of the survey, (2) the respondents believed that the interviewers were actually agents of the tax authorities and police department, which calls into questions whether they were accurately represent their prices, and (3) most respondents did not have financial information. In sum, Petitioners explain that without additional time to fully consider the FAO information, it is inappropriate for the Department to rely on this report for the calculation of the whole fish surrogate value.

QVD argues that the FAO study price is publicly available, nearly contemporaneous with the POR, represents data from 60 fish farms in Bangladesh, and is specific to the input, whole fish. Therefore, the FAO study should be considered a high quality source of information and should be used to calculate the whole fish surrogate value. Moreover, QVD argues that the FAO study price corroborates the prices of the 2006-2007 Gachihata financial statement.

Department's Position:

From the less-than-fair-value ("LTFV") investigation through the preliminary results of the third administrative review, the Department valued the whole fish input based on the sales value contained within the 2000-2001 Gachihata financial statements. In the final results of the third administrative review, the Department had both 2000-2001 and the 2006-2007 Gachihata financial statements on the record and relied on price from the 2006-2007 Gachihata financial statements to value the whole fish input. In the final results of this second new shipper and fourth administrative reviews, we have the same two financial statements on the record. However, the record of the instant review also contains the Director's Report for the 2006-2007 Gachihata financial statement in addition to *pangas* fish pricing information from a paper submitted to the United Nations Food and Agriculture Organization ("FAO") regarding the economics of aquaculture in Bangladesh. For these final results, we have determined that the Gachihata 2000-2001 financial statement is the most appropriate basis for calculating the whole fish input surrogate value.

Section 773(c)(1)(B) of the Act directs the Department to use "the best available information" from the appropriate market-economy country to value FOPs. In selecting the most appropriate surrogate values, the Department considers several factors including whether the surrogate value is: publicly available, contemporaneous with the POR, represents a broad market average, chosen from an approved surrogate country, are tax and duty-exclusive, and specific to the input. The Department's preference is to satisfy the breadth of the aforementioned selection criteria.

However, where all the criteria cannot be satisfied, the Department will choose a surrogate value based on the best available information on the record.

On February 3 and 10, 2009, the Department received the parties' case and rebuttal briefs, respectively, and on February 25, 2009, the Department held public and closed hearings for the administrative and new shipper reviews. In the briefs and during the hearings, parties presented their concerns with using the 2000-2001 and the 2006-2007 Gachihata financial statements as the basis for calculating the whole fish input surrogate value. Based on those presentations, the Department found it appropriate to make one final research effort for other potential whole fish surrogate values. On March 3, 2009, the Department placed on the record of this review *pangas* fish pricing information from a paper submitted to the United Nations FAO regarding the economics of aquaculture in Bangladesh.

However, after considering the parties' March 5 comments on this new data, we agree with Petitioners that additional time is necessary for both the interested parties and the Department to consider the merits and detailed information contained within the FAO report. Specifically, while QVD argues that the FAO study is a high quality report that satisfies the Department's criteria for finding the best information available, Petitioners raise several questions regarding the report, including the timing of the data and supporting documentation. Therefore, we do not find it appropriate to use the FAO report to calculate the whole fish input surrogate value in these reviews. Notwithstanding this, we find that the data contained within the FAO report is deserving of consideration in future proceedings where the Department and interested parties have sufficient time to fully consider the data gathering methods, pricing information, *etc.* As such, we intend to place the FAO information on the record of future and on-going proceedings so that it can be fully considered as a potential basis for calculating the whole fish surrogate value in those segments.

We agree with Petitioners that the 2006-2007 Gachihata financial statements, in particular the Director's Report, illustrate numerous financial concerns that, when taken together, cast considerable doubt on the reliability of using it as the basis for calculating a whole fish input surrogate value (*e.g.*, (a) the financial condition of the company had continued to deteriorate from prior years, (b) the Bangladeshi Government refused to provide financial assistance to overcome the company's losses despite Gachihata's pleas, (c) the company defaulted on bank loans due to cash flow, (d) the Bangladeshi SEC imposed penalties on the company directors for securities violations, (e) production of the company was at all-time lows because of shortage in working capital and operating losses).

Therefore, based on the concerns discussed above with the paper submitted to the United Nations FAO that the Department has had insufficient time to consider and concerns regarding the 2006-2007 Gachihata financial statements, we find that the 2000-2001 Gachihata financial statement is the best available information on the record of this review for calculating the whole fish surrogate value. While both financial statements are publicly available and specific to the input in question, the 2000-2001 financial statement contains more reliable pricing data. Although less contemporaneous than the 2006-2007 financial statement, consistent with our practice, we will inflate the value to the POR.

COMMENT 3: SURROGATE VALUE FOR BROKEN FILLETS

In the Preliminary Results the Department valued broken fillets using Indonesian import statistics from harmonized tariff schedule (“HTS”) article code 0304.90.100, “Other Fish Meat of Marine Fish,” to derive a value of \$2.34 per kilogram.¹⁶ Petitioners argue that the price used in the Preliminary Results is so high that it cannot be suitable for use, and that the import data they placed on the record, fish meat other than fillets from Bangladesh at \$0.25 per kilogram, is more reasonable. Alternatively, Petitioners argue that the Department should instead use the Indonesian import price used in the Fish 3rd AR Final, which was the Indonesian import statistics value from 2003 used to value broken fish fillets, which had a value of about \$0.79 per kilogram. That value has the same HTS number and comes from the same source as the value the Department used in the Preliminary Results.

QVD argues that the Department was correct to value broken fillets using Indonesian import statistics. QVD notes that the Bangladeshi import statistics are from 2003, while the Indonesian statistics are contemporaneous with the POR.¹⁷ QVD also notes that the Department has used the same Indonesian HTS source data in the two prior administrative reviews to value broken fillets. According to QVD, in the third administrative review, the Department used the Indonesian data despite the fact that the 2003 Bangladeshi data was on the record. Finally, QVD asserts that the Bangladeshi data is based upon sales of approximately \$75, while the Indonesian data is based on more than \$800,000 in sales.

Department’s Position:

Although Petitioners argue that the value of \$2.34 per kilogram for broken fillets is high, we find that it is appropriate given the similarity between it and regular fish fillets. In the Section D Questionnaire Response (“SDQR”), QVD refers to the byproduct as “broken fillets.” See SDQR at page 18 and supplemental section D questionnaire response at exhibits SD 16, 17, and 19. No party has disputed that the broken fillets are anything other than broken fillets. While broken fillets are not whole fillets, the Department finds that they do not fall into the category of fish meat other than fillets. As the Department finds the Indonesian data to be a more appropriate value to use than that of other fish meat other than fillets. Because the Indonesian data is contemporaneous with the POR, comes from a country that is economically comparable to Vietnam,¹⁸ and represents a broader market average because the value of sales from Indonesia is based on over \$800,000 in sales while the Bangladeshi value is based on total sales value of \$75, the Department finds it to be the best information on the record. Moreover, the data source from which we derive the broken fillets surrogate value is an updated value of the same source used in the last review. The source value was from 2007, updating the value used in the Fish 3rd AR Results which was from 2003. Petitioners’ effort to discredit the reliability of the 2007 value in favor of returning to the same source, but with values from 2003, is undermined by the fact that

¹⁶ See Preliminary Surrogate Value Memo at 8, Attachment 9.

¹⁷ See Petitioners’ First Surrogate Value Submission, May 22, 2008, Exhibit 4, page 2, and Exhibit 5

¹⁸ See Memorandum to the File from Julia Hancock, Case Analyst through James C. Doyle, Director, Office 9, RE: Antidumping Duty Administrative Review of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Selection of a Surrogate Country (August 1, 2006).

the value comes from the same source; it is simply a more contemporaneous value. Therefore, we will continue to use the Indonesian import statistics value used in the Preliminary Results.

COMMENT 4: INFLATORS FOR CERTAIN FACTORS OF PRODUCTION

Petitioners argue that the Department should correct the inflators used to calculate the surrogate values for electricity, truck freight, and boat freight. For the electricity inflator, Petitioners argue that the Statistical Yearbook of Bangladesh “2001-2002” data represent data from the Bangladeshi fiscal year, which Petitioners claim is from July 1 through June 30. Petitioners argue that the Statistical Yearbook’s header “2001-2002” indicates that the data represents pricing information from both 2001 and 2002 and that if the data in the Statistical Yearbook pertained only to 2002, as the Department’s Preliminary Results methodology assumes, then it would have labeled the header “2002” instead of “2001-2002.” Moreover, Petitioners argue that this is the standard Bangladeshi fiscal year as can be evidenced by Apex’s fiscal year which is also from July-June. For truck and boat freight, Petitioners similarly argue that the Statistical Yearbook information represents data from a one-year period corresponding to the Bangladesh fiscal year, however in this case for the 2004-2005 fiscal year (*i.e.*, July 1, 2004 through June 30, 2005).

QVD argues that Gemini, one of the companies the Department used in Preliminary Results for surrogate financial ratios does not have a July-June fiscal year and, thus, providing record evidence conflicting with Petitioners’ claim. QVD argues that Petitioners have failed to provide any credible evidence that the information in the Statistical Yearbook is recorded in a similar manner (*i.e.*, on a July-June basis).

Department’s Position:

In the Preliminary Results, the Department valued electricity, truck freight, and boat freight using sources that were not contemporaneous with the POR, and accordingly inflated these values based on inflators from the Bangladeshi Consumer Price Index (“CPI”).

Electricity - In calculating the electricity inflator, the Department used a CPI inflator calculated by dividing the average CPI for the POR by the average CPI for calendar year 2002 only. First, we do not agree with Petitioners that simply because the financial statements of one company, Apex, identify the fiscal year as July-June, that this is necessarily an indicator that all companies in Bangladesh use this same fiscal year period. Moreover, we agree with QVD that the financial statements of Gemini, another Bangladeshi company, contradict Petitioners’ assertions in that Gemini’s fiscal year is not July-June. Therefore, we do not have a basis to conclude that July-June is the fiscal year used by all companies in Bangladesh.

Nonetheless, our methodology in the Preliminary Results needs to be revised because we do not know when in 2001 the data points begin and when in 2002 the data points end; we must include all months from 2001 and 2002 as we have no basis to exclude any months.

Truck and Boat Freight – In the Preliminary Results, the Department calculated the inflator by dividing the average CPI for the POR by the average CPI for the full calendar years 2004 and 2005. This methodology is consistent with that described above for electricity above and

therefore, we will not revise the inflator calculation for truck and boat freight for these final results.

COMMENT 5: QVD

A. QVD'S U.S. SALES DATA

Petitioners argue that the Department should disregard QVD's reported U.S. sales data because it has not reported the first price to unaffiliated United States customers. Petitioners argue that there are two possible affiliation scenarios in this review, (1) QVD USA LLC ("QVD USA") and Beaver Street Fisheries ("BSF") are affiliated because QVD USA and BSF simultaneously employed Person X and (2) QVD USA and BSF are affiliated because BSF indirectly controlled QVD USA by virtue of BSF's direct operational control over Person X and Person X's operational control over QVD USA.¹⁹

According to Petitioners, the Department cannot find that the price between QVD USA and BSF is derived from arm's length negotiations, which calls into question the reliability of reported sales prices. In order to overcome this shortcoming, Petitioners argue that BSF's resale prices to its unaffiliated customers should have been reported on the record. Without this information, Petitioners argue that the Department does not have reliable information upon which to calculate an antidumping duty margin. Petitioners contend that the Department's regulations allow for application of facts available when issuing its determination. Petitioners argue that the Department is required to apply adverse facts available ("AFA") here because QVD mischaracterized the relationship between QVD, QVD USA, BSF, and Person X. As sales between QVD USA and BSF represented a significant portion of total United States sales, and the responses were incomplete, it is unreasonable to use the reported data to calculate a margin. Therefore, Petitioners contend that the Department should reject the submitted sales information and apply AFA, and assign QVD the Vietnam-wide rate of 63.88% for all sales to BSF and its affiliate, and limit the actual duty calculations to QVD USA's sales to unaffiliated United States purchasers.

QVD argues that Petitioners' arguments are directly contradicted by the record, the Department's prior findings on this issue, and the language of the statute. QVD notes that in the past two reviews the Department has investigated the relationship between QVD, QVD USA, BSF and Person X. In the third review the Department found no evidence on the record to indicate that QVD USA or BSF are in a legal or operational position to exercise restraint or control over each other, or that they are under the common control of Person X. Furthermore, Person X's function at BSF does not involve making or approving sales or as acting as an agent. The function Person X performs for BSF involves providing market pricing information, not in making or approving sales. QVD argues that the Department's finding in the third review is contradictory to Petitioners' assertion that Person X serves as an agent for both QVD USA and BSF in sales transactions. QVD explains that Person X does not have the ultimate say in QVD USA's selling prices nor does Person X negotiate purchases on behalf of BSF. The sole owner of QVD USA has the ultimate authority in acting or rejecting sales offers. Therefore, QVD states that Person

¹⁹ Due to the business proprietary nature of the arguments only a limited summary is provided here. A detailed discussion is available in Petitioners' case brief at pages 35-43.

X is not an owner of QVD USA or BSF nor is he in a position to exercise restraint or direction over QVD USA or BSF.

Finally, QVD argues that the assertion that the Department should apply AFA is without merit. QVD notes that Petitioners did not identify any facts that have been mischaracterized by QVD. Because QVD reported all United States sales in conformity with the Department's instructions, to apply AFA now would be inappropriate.

Department's Position:

In the last two administrative reviews the Department examined the relationship between QVD, QVD USA, BSF and Person X. See Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results of the Second Administrative Review, 72 FR 13242 (March 21, 2007) ("2nd AR Final Results") and accompanying Issues and Decision Memorandum at Comment 1D; Fish 3rd AR Final at Comment 5A (citing the 2nd AR Final Results²⁰). In each segment, the Department found that there was no affiliation between QVD USA and BSF such that the prices reported by QVD USA to BSF were inappropriate. Specifically, we determined that there was not sufficient evidence of the type of control relevant to the dumping analysis to warrant an affiliation between QVD USA and BSF.

The key to the application of affiliation between QVD USA and BSF is control which is discussed in section 771(33) of the Act: "... a person shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over the other person." Control is important in party affiliations in the dumping analysis because the statute requires the Department to not use the prices between affiliated parties which are not necessarily set by the market and which the affiliated parties are in a position to manipulate. See sections 772(a) and (b) of the Act.

First, no party disputes that (1) other than Person X, QVD USA and BSF share no other employees, (2) there is no common ownership between QVD USA and BSF, and (3) QVD USA does not influence BSF's prices. In the 2nd AR Final Results we found that "while Person X acts as QVD USA's agent in the United States and is also employed by BSF, there is no evidence on the record to indicate that QVD USA or BSF are in a legal or operational position to exercise control over each other, or that they are under common control of Person X." See 2nd AR Final Results and accompanying Issues and Decision Memorandum at Comment 1D. Therefore, the Department considered the evidence on the record and determined that although Person X was employed by both companies there is no evidence that QVD USA or BSF was in a position to control or affect each others' prices through Person X. QVD USA does not control Person X and BSF does not control QVD USA through Person X. These determinations were made by considering the information underlying the decision in the 2nd AR Final Results, which QVD has certified remains unchanged in this review. Person X's duties as described in the second administrative review have not changed and QVD certified to that its July 11, 2008, Section A questionnaire response, at 20. Moreover, the Department placed on the record several memoranda, including one memorandum from of the second administrative review which

²⁰ See 2nd AR Final Results and accompanying Issues and Decision Memorandum at Comment 1D.

describes in detail Person X's activities at each company. See Memorandum to the File from Alan Ray, Case Analyst, dated September 2, 2008 ("Collapsing and Affiliation Memo to File").

Petitioners contend that the mere fact that QVD USA and BSF share an employee is sufficient to find an affiliation under section 771(33) of the Act because both QVD USA and BSF employ Person X. This is Petitioners' affiliation scenario 1 and we disagree with Petitioners again in this review and note that we have fully considered this affiliation scenario in the last review. Id. Only if the Department's control analysis indicated that BSF was in a position to control QVD USA's prices through Person X or that QVD USA was in a position to control the price that BSF paid for the merchandise through Person X could an affiliation determination be made. There is no evidence of either on the record of this review. There is no evidence that QVD USA is in a position to make BSF, a company which other than sharing an employee has no financial ties to QVD USA, behave in a certain manner in order to manipulate the dumping margins.

With respect to Petitioners' affiliation scenario 2 where it is argued that BSF and QVD USA are affiliated because BSF controls both Person X (directly) and QVD USA (indirectly) through Person X, we disagree. Although we agree that BSF and Person X have an employer-employee relationship, there is no evidence that BSF can control QVD USA's prices through Person X. Simply because both BSF and QVD USA each employ Person X does not make these two companies affiliated under the employer-employee relationship provision. Moreover, there is no evidence that QVD USA and BSF are in a position to control each other through Person X. Where two companies share an employee and the evidence does not demonstrate that employee has control over the two companies or that that employee's activities allow one company or any third party to exercise control over the companies, they cannot be affiliated. See Hontex Enterprises, Inc. v. United States, 248 F. Supp. 1323, 1345-46 (CIT 2003). See Collapsing and Affiliation Memo to File.

As such, we continue to find that the facts on the record do not support a finding of affiliation between QVD USA and BSF pursuant to section 771(33) of the Act and therefore, AFA is not warranted. Consequently, we will continue to use QVD USA's sales to BSF.

B. INTERNATIONAL FREIGHT CALCULATION

Petitioners note that under section 772(c)(2)(A) of the Act, the Department must adjust gross unit U.S. prices by movement expenses incurred in transporting the merchandise. In order to correctly calculate the movement expenses, the Department must convert international freight to the same weight basis used for QVD's prices and all other expenses. In the Preliminary Results the Department calculated a U.S. constructed export price ("CEP") using prices and adjustments from QVD's sales data file. QVD reported its U.S. prices and all expenses other than international freight on a net weight basis. The international freight was reported on a gross-weight basis, which included the weight of the fish plus glazing and packing materials. Petitioners argue that in order for the Department to accurately account for QVD's international freight expenses, they must be converted to a net-weight basis.

QVD argues that the international freight calculation used in the Preliminary Results was correct. QVD argues that the methodology used in the Preliminary Results has been calculated in prior reviews. Specifically, QVD argues that in the second and third administrative reviews, the

Department calculated and applied the freight adjustment on the basis on which such expenses were incurred—gross weight.

Department's Position:

We agree with QVD that in prior reviews we deducted the freight expenses which were on a gross-weight basis from the reported per-unit price which was on a net-weight basis. Although we have previously deducted freight from the unit price when freight was on a different weight basis, we now find that this is incorrect. We reevaluated our calculation and now find that there is an inconsistent unit of measure that would generate a distortion if we deduct freight expenses from the unit price when these two components are not on the same basis. To correctly calculate the freight costs, the Department should deduct the freight expenses based on a net-weight basis similar to the weight basis for the unit price and the other price adjustments and movement expenses. Therefore, we will convert QVD's international freight to the common net-weight basis.

C. DUTY ABSORPTION

Petitioners argue that QVD did not provide affirmative evidence demonstrating that the U.S. purchaser will pay the full amount of antidumping duties assessed on entries of subject merchandise. Petitioners argue that QVD did not overcome the presumption of absorbing duties simply because it claimed that its sales revenues exceeded cost of goods sold and that its U.S. sales prices exceeded entered value. According to Petitioners, the financial statements which show costs of goods sold and sales are not specific to costs and sales of only subject merchandise, which are therefore, not an appropriate basis for this analysis. Petitioners also disagree with QVD's transaction-specific analysis. See Petitioners' February 3, 2009 Case Brief at 49-50. Petitioners also argue that QVD did not provide other types of evidence (e.g., agreements between QVD and unaffiliated purchasers) that U.S. purchasers would pay the full duties upon assessment.

QVD did not submit comments on this issue.

Department's Position:

Section 751(a)(4) of the Act provides that, if requested, the Department shall determine during an administrative review initiated two or four years after the publication of the order "whether antidumping duties have been absorbed by a foreign producer or exporter. . . if the subject merchandise is sold in the United States" through an affiliated importer.

As the order was published in 2003 and this review was initiated in 2007, Petitioners may request the Department to determine whether duties were absorbed. It has been the position of the Department that in determining whether antidumping duties have been absorbed by a respondent during the POR, we presume that the duties will be absorbed for those sales that have been made at less than normal value. A duty absorption analysis basically provides that if a respondent is dumping, the respondent also is presumed to be absorbing duties and the burden falls on the respondent to show otherwise. See Gray Portland Cement and Clinker From Mexico;

Final Results of Antidumping Duty Administrative Review, 65 FR 13943 (March 15, 2000) and accompanying Issues and Decision Memorandum at Comment 26.

In the Preliminary Results we stated that the information provided by QVD was sufficient to show that antidumping duties were not absorbed by QVD on U.S. sales made through its affiliated U.S. importer. See Preliminary Results at 52019. However, after evaluating the comments submitted, we find that the information submitted by QVD is insufficient to find that QVD did not absorb the duties.

On August 25, 2008, QVD referenced its profit and loss statement to show that the costs of goods sold exceeded the revenue generated. In addition, QVD claimed that the entered value of the products sold was greater than the net U.S. price (after deducting the AD duty). First, we note that QVD referenced exhibit 11 of its Section A response in its supplemental questionnaire of August 25, 2008. This exhibit contains the financial statements from all QVD affiliates. Therefore, we cannot identify the exact revenue and costs of goods sold that QVD intended to use in this analysis. QVD and its affiliated companies produced and sold products that are not subject merchandise. Therefore, any analysis relying on the financial statements here would be insufficient. For the entered value comparison to the net U.S. price, we find that we cannot rely on the entered value because this typically represents the transfer price from QVD to QVD USA – a transaction between affiliates. Therefore, using it in a duty absorption analysis would be inappropriate.

In prior cases the Department has accepted written contract or agreements where U.S. unaffiliated customers agree to pay the duties assessed on the entries they purchase. A contract such as this is inherently future-looking and necessarily requires the unaffiliated U.S. customer to carry a liability on an undetermined antidumping duty. In the past, the Department has found this to be persuasive evidence of passing on the antidumping duty costs. See Certain Stainless Steel Butt-Weld Pipe Fittings From Taiwan: Preliminary Results of Antidumping Duty Administrative Review and Notice of Intent To Rescind In Part, 70 FR 39735 (July 11, 2005) (unchanged in the final results); Dynamic Random Access Memory Semiconductors of One Megabit or Above From the Republic of Korea: Final Results of Antidumping Duty Administrative Review and Determination Not To Revoke the Order in Part, 64 FR 69694, 69704 (December 14, 1999). Here, QVD did not provide such an agreement or other types of reliable information to rebut the duty absorption presumption.

The burden is on the respondent to show that it did not absorb antidumping duties because the respondent is the only party to the proceeding able to provide such evidence. In this case, QVD is the party possessing the information relevant to duty absorption and it has not provided sufficient rebuttable information such as an agreement between the affiliated importer and the unaffiliated purchaser. Therefore, the Department finds the record does not contain evidence that duties were not absorbed by the unaffiliated U.S. customers. For these final results we find that QVD did not rebut the duty absorption presumption with evidence that the unaffiliated purchaser will pay the full duty ultimately assessed on the subject merchandise. In accordance with section 751(a)(4) of the Act we will notify the International Trade Commission of our findings for consideration in their sunset review.

D. COLLAPSING QVD/DONG THAP WITH THUAN HUNG

QVD argues, as they have in prior reviews, that Thuan Hung should not be collapsed with QVD/Dong Thap. QVD notes that the Department's affiliation finding between Thuan Hung and QVD is limited to the fact that Thuan Hung is owned by the brother/uncle of two QVD shareholders. QVD states that the Department's regulations require the application of a two-pronged test to determine whether or not it is appropriate to collapse two affiliated parties. First, section 351.401(f)(1) of the Department's regulations states that the Department will treat "two or more affiliated producers as a single entity where those producers have production facilities for similar or identical products that would not require substantial retooling."

Second, section 351.401(f)(2) of the Department's regulations states that in identifying a significant potential for the manipulation of price or production, the Department will consider "(i) {t}he level of common ownership; (ii) {t}he extent to which the firms share managerial employees or board members; and (iii) {w}hether operations are intertwined, such as sharing of sales information, involvement in production or pricing decisions, the sharing of facilities or employees, or significant transactions between themselves.

QVD concedes the first prong in the determination of whether collapsing is appropriate. However, with respect to the second prong QVD argues that the Department's standard for collapsing based upon the possibility of manipulation of price or production between the entities must be significant. See Antidumping Duties; Countervailing Duties, 62 FR 27296, 27345-6 (May 19, 1997). QVD argues that the possibility of manipulation of prices or production is insufficient grounds upon which to warrant collapsing.

QVD argues that contrary to the Department's analysis, there is no common ownership (section 351.401(f)(2)(i) of the Department's regulations) by the individual family members in either Dong Thap or Thuan Hung. According to QVD, the companies and the shareholders do not have any shared equity or investments in any other companies; nor do they have a shared parent or holding company or any shared subsidiaries. QVD asserts that without common shareholders, together with the absence of other control factors, there is very little ability or incentive for one company to manipulate price or production.

With respect to section 351.401(f)(2)(ii) of the Department's regulations, QVD argues that the companies do not have common board members, directors or management, do not have access to each other's board minutes or meetings, do not take collective decisions on any business matters and act entirely independently of each other in directing their operations. QVD notes that it is significant that none of the family members for Dong Thap sit on the boards of management committees of Thuan Hung. QVD also notes that it is significant that the sole family member with ownership in Thuan Hung does not sit on the board of management committees of other QVD companies. According to QVD, overlapping board memberships and directorships between the companies are critical in the determination to collapse two separate affiliated companies. See Certain Welded Carbon Standard Steel Pipes and Tubes From India; Final Results of New Shippers Antidumping Duty Administrative Review, 62 FR 47632, 47639 (September 10, 1997) ("Tubes from India").

QVD argues that even if treated as a single entity, QVD and Thuan Hung do not have intertwined operations. QVD contends that the Department's evidence of intertwined operations was based solely on a prior tolling relationship between the companies, which was temporal (ending four years ago) and was not significant. According to QVD, the tolling relationship between the companies was no different than any other tolling relationship QVD had with other unaffiliated companies. QVD also claims that Dong Thap and Thuan Hung are competitors and that their tolling relationship has not resumed and given the poor relations between the companies, is unlikely to resume. Citing several cases, QVD argues that the Department has refused to collapse affiliated companies possessing common ownership or overlapping board or managerial positions where there is an absence of intertwined operations. See Certain Welded Carbon Steel Pipes and Tubes from Thailand: Final Results of Antidumping Duty Administrative Review, 63 FR 55578 (October 16, 1998) ("Tubes from Thailand"); Stainless Steel Sheet and Strip in Coils From Taiwan: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 69 FR 5960 (February 9, 2004); Notice of Final Determination of Sales at Less Than Fair Value and Final Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the Republic of Korea, 71 FR 29310 (May 22, 2006). QVD argues that QVD and Thuan Hung do not jointly employ or share managers, executives or employees and that there is no actual overlap of family members on the boards of directors and there are no commercial transactions or other indicia of common control or influence between the parties, thereby distinguishing themselves from cases where the Department has decided to collapse companies. Therefore, QVD argues the Department should not collapse QVD and Thuan Hung.

Finally, QVD argues that there is no evidence that QVD and Thuan Hung have manipulated prices or production due to their familial ties. QVD asserts that even if their interests were aligned in future cooperation or collusion, QVD and Thuan Hung are not legally or operationally in a position to exercise restraint or control over one another as envisioned in section 771(33)(F) of the Act. See Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Bar From Germany, 67 FR 3159 (January 23, 2002) and accompanying Issues and Decision Memorandum at Comment 15. According to QVD, the Department's assumption that a family member without any prior ownership interest in, board membership on, or interaction with a competitor company could so readily join the board and management committees is not realistic. Therefore, QVD argues that the Department's position that QVD and Thuan Hung could, in the future, collaborate and manipulate pricing, expense allocation and production due solely to the existence of a common family member between the companies, is not legally or factually sufficient to collapse these entities.

Petitioners argue that the Department should continue to collapse QVD and Thuan Hung. They contend that each of the conditions required for collapsing have been met, according to section 351.401(f) of the Department's regulations. Petitioners note that QVD concedes that QVD and Thuan Hung are affiliated through a family relationship. Second, both QVD and Thuan Hung produced subject merchandise during the POR. Third, Petitioners argue that there exists significant potential for the manipulation of prices or production between QVD and Thuan Hung.

With respect to significant potential for manipulation of prices and production, Petitioners argue that the Department should examine collapsing factors from the perspective of the singular family unit. See Ferro Union v. United States, 44 F. Supp. 2d 1310, 1325 (CIT 1999) ("Ferro

Union”). Therefore, Petitioners argue, from the perspective of the single family, a significant potential for manipulation or prices and production exists because there is a significant level of ownership, common (through individual family members) shared employees and board members and the operations are intertwined given the past tolling relationship between QVD and Thuan Hung which ended only a few years prior to this POR. This differentiates this case from the facts in Notice of Final Determination of Sales at Less Than Fair Value and Final Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the Republic of Korea, 71 FR 29310 (May 22, 2006) (the two companies the Department decided to not collapse had not engaged in business activities in 18 years). Accordingly, Petitioners argue that given the familial relationships between the two companies, the recent history common business transactions, and the potential of the family unit to exercise legal and operational control supports treating them as collapsed entities in the final results.

Department’s Position:

In the second administrative review, the Department collapsed Thuan Hung with QVD and QVD Dong Thap. In the third review, the Department collapsed Thuan Hung with QVD and Dong Thap, as it had in the preceding review, based on statements that during the third POR, the facts had not changed since the preceding review. See 2nd AR Final Results at Comment 1A, see Affiliation and Collapsing Memorandum to James C. Doyle, through Alex Villanueva, from Julia Hancock, August 31, 2006, and see Fish 3rd AR Final and Issues and Decision Memorandum at 5B. There are no new facts in this review. However, QVD argues that other than the family affiliation, if the situation is analyzed from the viewpoint of the individual company, Thuan Hung, there is no evidence of financial ties or transactions that would support a determination to collapse Thuan Hung with QVD and QVD Dong Thap in this review period. We disagree with QVD and find that we properly analyzed the collapsing criteria from perspective of the affiliated family grouping in addition to the individual company perspective of Thuan Hung and that our determination to collapse Thuan Hung with QVD and QVD Dong Thap is supported by substantial evidence and otherwise in accordance with law.

Pursuant to section 351.401(f) of the Department’s regulations, affiliated parties will be treated as a single entity where (1) “those producers have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities” and (2) “the Secretary concludes that there is a significant potential for the manipulation of price or production.” See section 351.401(f) of the Department’s regulations. The regulations further provide a non-exhaustive list of three factors that the Department may consider in determining whether a significant potential for manipulation exists: 1) the level of common ownership; 2) the extent to which managerial employees or board members of one firm sit on the board of directors of an affiliated firm; and 3) whether operations are intertwined. See section 351.401(f)(2) of the Department’s regulations.

In this case, QVD does not dispute that it is part of the affiliated QVD family group. QVD also does not dispute that Thuan Hung has production facilities that can produce and indeed did produce during the POR products similar or identical to the subject merchandise. What QVD does dispute is our determination that there is a significant potential for manipulation of prices and/or production. QVD argues that other than the family affiliation, there is no record evidence to indicate significant potential to manipulate prices or production. Contrary to QVD’s

arguments, there is substantial record evidence that demonstrates the significant potential for manipulation of prices and/or production.

With regard to the first control factor, ownership, under section 351.401(f)(2) of the Department's regulations, the Department found that the QVD family members "comprise the only shareholders and the largest share holders as a family in each company" and that as a result the QVD family companies have the ability or incentive to coordinate their action in order to "direct . . . {the companies} . . . to act in concert with each other." See 2nd AR Final Results at Comment 1A.

QVD challenges the ownership determination arguing that pursuant to the Department's precedent in Tubes from Thailand that common family ownership is not sufficient to collapse companies without further indicia of control. While the Department agrees that common family ownership is in and of itself insufficient to make a collapsing determination, QVD's analysis of Tubes from Thailand is incomplete. In fact, the Tubes from Thailand determination supports our determination that from a family group perspective, the ownership of Thuan Hung is a positive indicator of the significant potential for manipulation. In Tubes from Thailand, the Department, in deciding not to collapse one company into the others, found that the family in question was only a minority owner. See Tubes from Thailand at 55583. In the instant case, the existence of the family group and the significant controlling ownership by the family members as describe above is substantial evidence in support of the collapsing decision.

With regard to the second control factor under section 351.401(f)(2), the Department finds that because senior leadership positions of each of the QVD companies are filled with members of the QVD family combined with fact that the QVD family members are the largest stakeholders in the company ". . . clearly shows that the family has the ability and financial incentive to coordinate their actions to direct . . . {the companies} . . . to act in concert with each other. See 2nd AR Final Results at Comment IA. QVD argues that this control factor requires overlapping boards of directors and, as a result, the Department cannot collapse Thuan Hung with the other QVD companies. We disagree with QVD. There is nothing in the statute or regulations that require overlapping of individuals on the boards of directors. The regulation's list of factors is a non-exhaustive list and suggests three factors for the Department to examine in establishing significant potential for control. Accordingly, the Department examined the issue from the family group perspective, whether the members of the QVD family group were on the boards of the QVD companies and determined that the QVD companies were substantially owned and run by the QVD family members. Id.

QVD's attempt to limit the scope of the analysis to whether or not the companies shared board members is unsupported by law. The Department has made a family group determination which QVD does not contest. The Department clearly has the authority to consider the facts in their entirety to find the extent they demonstrate control. It is a reasonable exercise of the Department's discretion to, in situations in which it has found a family grouping, to extend the analysis of sharing boards of director to the family group level where the companies are owned and controlled by family members. As explained above, Congress recognized the importance of family groups to the control analysis when it adopted the SAA which accompanied the Uruguay Round Agreements Act. See SAA at 838, section 351.102(b) of the Department's regulations. The SAA provides that "the Secretary will consider the following factors, among others: corporate or family groupings." Id. As a result, even though Thuan Hung does not share any

board members with the other QVD companies, the fact that members of the QVD family group are in senior leadership positions in all of the QVD companies, supports a determination that there is a significant potential for manipulation so that the companies should be collapsed.

QVD also cites Tubes from India in support of the proposition that overlapping boards of directors is a critical necessary finding in the instant case. We find that QVD's reliance is misplaced. The Tubes from India case involves a determination that a corporate grouping should be collapsed not whether a family grouping should be collapsed. See Tubes from India at 47638. It is understandable that without the family relationships of a family grouping, shared board of directors could be an important factor to the Department's analysis of whether a significant potential for manipulation exists. However, in the instant case, we have a family grouping determination and thus it is appropriate for the Department to consider the ramifications of the family group relationship.

A more analogous case would be the Tubes from Thailand case. In Tubes from Thailand, the Department, in examining the family group's role in a particular company, examined the position of the family member in that company and determined that the family member was only one of nine directors and a deputy managing director. See Tubes from Thailand at 55583. That combined with the fact that the family at issue had only a minority interest in the particular company resulted in the Department's determination not to collapse that company with the other family group companies. *Id.* Using the same analysis in this case, leads to the conclusion that Thuan Hung should be collapsed with the other QVD companies because, as explained above, a family member is the largest share holder and holds a senior leadership position in the company.

With regard to the last factor, intertwined operations, the Department has relied on several facts. First, we found that Thuan Hung had an arrangement in the past to process frozen fish fillets for export to the United States with QVD and QVD Dong Thap. The Department acknowledges that the arrangement ended in 2003, however, it still finds that it is evidence of the potential for intertwined operations in the future. However, the Department has not relied on this fact alone in making its determination. In addition, the Department found that Thuan Hung processed Vietnamese fillets like the subject merchandise during the POR and that Thuan Hung had an import-export registration so that it could export to the United States. See 2nd AR Final Results at Comment 1A. As a result, the Department found that there was a potential for intertwined transactions such that when combined with the family group determination, and the level of ownership and direct control of family members over the QVD companies that there was substantial evidence on the record supporting a determination that Thuan Hung should be collapsed with QVD and QVD Dong Thap.

Therefore, based on the totality of the circumstances, the Department continues to find that there exists a significant potential for manipulation of price and/or production by QVD, QVD Dong Thap and Thuan Hung. As a result, the Department's determination to collapse Thuan Hung with QVD and QVD Dong Thap is supported by substantial evidence on the record and is otherwise in accordance with law and will remain unchanged in these final results.

E. LABELS SURROGATE VALUE

QVD states that the Department should not have valued labels by using Thuan Hung's reported label factor in its FOP file. QVD argues that Thuan Hung's labels are only used for sales

domestically and to third countries, not the United States.

Petitioners argue that it does not matter if Thuan Hung did not use labels on subject merchandise exported to the United States, it was proper to include them in the normal value calculation. Petitioners note that it is the Department's practice in NME cases to calculate weighted average factors for each CONNUM sold to the United States, and to include all factors utilized by each collapsed entity if the entity produces the same CONNUMs as were sold to the United States. According to Petitioners, this is done regardless of whether the product was exported to the United States or used all such factors for the individual products actually exported to the United States.

Department's Position:

As explained above in Comment 5D, Thuan Hung remains a part of the QVD single entity. QVD reported all packing materials used by Dong Thap and only labels for Thuan Hung. The labels reported for Thuan Hung were for third country sales and/or domestic sales because Thuan Hung does not sell frozen fish fillets to the United States.

Although we agree with Petitioners that in a single entity analysis we collect a weighted-average FOPs database, we cannot include Thuan Hung's labels or other packing materials in the dumping calculation. Because the dumping duty calculation requires a comparison of the U.S. price to the price of the product packed and ready for shipment to the United States, only those packing materials that were used to pack the merchandise to the United States may be included. Here, Petitioners would have the Department include all packing materials, even for products that were not shipped to the United States, which would capture non-U.S. packing expenses. Adopting Petitioners' method would lead to including expenses not attributable to the subject merchandise sales. As such, we will not include any of Thuan Hung's packing materials (only labels in this case) in the calculation of normal value for the QVD single entity.

F. DIESEL FUEL SURROGATE VALUE

QVD argues that the Department should convert its diesel factor from liters to kilograms before multiplying the consumption quantity by the surrogate value. The surrogate value for diesel used in the Preliminary Results was on a kilogram basis. The Department should convert the diesel from liters to kilograms by multiplying the factor by 0.82.

Petitioners did not submit comments on this issue.

Department's Position:

We agree with QVD that the diesel consumption figure should have been converted from liters to kilograms before multiplying it by the surrogate value. For these final results, the Department will convert the diesel factor from liters to kilograms prior to multiplying it by the surrogate value.

COMMENT 6: AGIFISH SEPARATE RATE MARGIN

Petitioners argue that the Department should assign Agifish a separate rate margin based on its calculated company-specific margin in the LTFV investigation because this would ensure that the Department complies with the mandates of the statute and legal precedent and follows its practice of assigning separate rate companies in review proceedings their individually calculated margins from previous segments when all individually reviewed companies in the current review receive zero, de minimis, or total AFA margins.

Petitioners argue that the statute does not expressly state a methodology for assigning separate rate margins to non-selected companies in NME proceedings when all individually reviewed companies receive zero, de minimis, or total AFA margins. However, according to Petitioners, 19 U.S.C. § 1673(c)(5)(B) addresses the analogous issue of determining an appropriate all others rate for non-reviewed companies in LTFV proceedings. Petitioners also note that the SAA highlights the fact that one of the Department's central criteria for selecting an appropriate all others rate is that it reasonably reflects non-investigated exporters' or producers' potential dumping margins.

Petitioners note that in the Department's recent determination in 2nd AR Shrimp from Vietnam, the Department clearly indicated a preference for using a company's own calculated rate from a previous segment when assigning the company a non-selected separate rate in an NME administrative review when it assigned Seaprodex Minh Hai its own calculated antidumping margin from the LTFV investigation. See Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review, 73 FR 52273 (September 9, 2008) at Comment 6 ("2nd AR Shrimp from Vietnam"). Therefore, the Department's decision to assign Agifish a 15.38 percent margin in the Preliminary Results is inconsistent with this precedent.

Petitioners explain that an important consideration for the Department appears to have been the fact that 15.38 percent margin was more recent than Agifish's LTFV investigation margin. See Preliminary Results at 52017. However, Petitioners argue that any decision to assign margins must be based on best information available and must establish margins as accurately as possible. In addition, Petitioners argue that the Department must explain a rational connection between the facts found and the choices made. According to Petitioners, the Department's decision to assign Agifish a 15.38 margin based on a different company's new shipper review margin, when the company already had its own calculated rate, does not satisfy these conditions. Petitioners argue that the Department has not articulated why a recently calculated margin for another entity is more accurate than the rate previously calculated for Agifish in the LTFV investigation. Accordingly, Petitioners argue that the Department should revise Agifish's separate rate margin and assign it the individually calculated margin that it received in the LTFV investigation, 47.05 percent, for these final results.

No other party submitted comments on this issue.

Department's Position:

For these final results we calculated a 0.52 percent dumping margin for QVD. We note

Petitioners' comments on this issue were centered around the appropriate assignment of a rate when the calculated rate is zero, de minimis, or AFA. However, because QVD's calculated margin is not zero, de minimis or based on AFA, Petitioners' comment is moot. Therefore, consistent with our practice to weight-average the rates for companies, excluding zero, de minimis, rates and rates based on entirely facts available, we are assigning 0.52 percent as the separate rate for both Agifish and Anvifish, which is based on the margin calculated for the single mandatory respondent, QVD.

COMMENT 7: AN XUYEN SEPARATE RATE MARGIN

An Xuyen argues that since now the Department is aware that it did in fact file a separate rates application in the instant review, the Department should correct the preliminary finding that An Xuyen is not entitled to a separate rate. Moreover, An Xuyen argues that it should receive the margin calculated for the only mandatory respondent even if the margin is zero or de minimis. An Xuyen also argues that it should not receive the margin of 15.38 percent used in the Preliminary Results for the separate rates companies because it would be punitive, as no other respondent in this proceeding received a positive calculated margin. According to An Xuyen, a positive margin from a previous review has no connection to the margins calculated in this review and is arbitrary and punitive.

Petitioners argue that the Department should continue to deny An Xuyen a separate rate for these final results. According to Petitioners, An Xuyen failed to provide (1) documentation demonstrating receipt of payment, (2) business registration certificates with expiration dates, (3) submit its export certificate of approval or foreign trade operator registration, and (4) evidence of price negotiations.

Petitioners argue that the separate rates application requires the applicant to provide legible copies of documents including "documentation demonstrating receipt of payment." See An Xuyen's Separate Rates Application at Section II, Question 4. Petitioners also note that if An Xuyen could not provide supporting documentation for the payment, the application provides alternatives to An Xuyen. However, Petitioners state that An Xuyen did not provide the payment documentation nor did it provide the alternatives allowed in the application. Therefore, consistent with a similar facts pattern in Diamond Sawblades from China, Petitioners argue that the Department should deny Any Xuyen a separate rate in the instant review for not providing payment documentation, or the alternatives, with its separate rates application. See Final Determination of Sales at Less Than Fair Value and Final Partial Affirmative Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the People's Republic of China, 71 FR 29303 (May 22, 2006) ("Diamond Sawblades from China") and accompanying Issues and Decision Memorandum at Comment 12. Petitioners also note that because An Xuyen did not file its separate rates application until the last day of the deadline to submit an application, the Department was unable to request additional information. Petitioners note that this is explicitly described in the application. See An Xuyen's Separate Rates Application at 1.

Petitioners also argue that An Xuyen failed to provide a business registration certificates with expiration dates even though the separate rates application specifically requires it or, in the alternative, an explanation for the missing expiration dates. See An Xuyen's Separate Rates Application at Section II, Question 4. Moreover, Petitioners note that the record contains

contradictory evidence on the establishment of An Xuyen. Petitioners note that Exhibit 2 of the An Xuyen Separate Rates Application states it was established on October 22, 2003, however, other documents accompanying the application indicate that An Xuyen was established on June 28, 2006. See An Xuyen's Separate Rates Application at Exhibit 3. Therefore, even if the Department considered the information submitted by An Xuyen, it is inconsistent, thereby supporting the Department's rejection of An Xuyen's request for a separate rate in the instant review.

Petitioners also argue that An Xuyen failed to provide an export certificate of approval or foreign trade operator registration as required by the separate rates application. See An Xuyen Separate Rates Application at Section III, Question 3c, n. 11. Therefore, because An Xuyen did not provide this required documentation and did not explain why it could not submit it, An Xuyen is not eligible for a separate rate in the instant review.

Finally, Petitioners also argue that An Xuyen did not provide evidence of price negotiation as required by the separate rates application. See An Xuyen Separate Rates Application at Section IV, Question 8. Moreover, Petitioners note that An Xuyen did not provide an explanation of its omission of the price negotiation documentation. As a result, Petitioners argue that An Xuyen does not qualify for a separate rate based on this and the other three missing items listed above and should continue to be considered part of the Vietnam-wide entity for these final results.

Department's Position:

In the Preliminary Results An Xuyen was not assigned a separate rate, but instead was considered part of the Vietnam-wide entity. We incorrectly stated in the Preliminary Results that An Xuyen did not submit a separate rates application. An Xuyen submitted a separate rates application on December 12, 2007. Since the Preliminary Results, we have examined An Xuyen's separate rates application and find that it does not satisfy the requirements of the separate rates application and, therefore, An Xuyen should not be assigned a separate rate in the instant review.

Section II, Question 4 of the separate rates application requires An Xuyen to submit "documentation demonstrating receipt of payment." An Xuyen responded by including other types of documents, but failed to include payment information. An Xuyen provided no explanation as to why it did not provide the required payment information. It has been our practice to deny a company a separate rate when it does not provide the required payment information. See Diamond Sawblades from China at Comment 12. Therefore, absent payment information from An Xuyen for its sales to United States during the POR, we are unable to assign it a separate rate. As stated in the Department's policy bulletin on separate rates, the Department will deny separate rates status to companies that have not submitted a complete separate rates application by the deadline. See "Separate-Rates Practice and Application of Combination Rates in Antidumping Investigation Involving Non-Market Economy Countries, at 5-6 (<http://ita.ita.doc.gov/policy/bull05-1.pdf>).

Although we agree with Petitioners that there are other areas of concern with An Xuyen's separate rate application, we find that the failure to provide payment information automatically eliminates it from consideration and, therefore, we find it unnecessary to address these other

issues. As such, for the final results we will continue to consider An Xuyen as part of the Vietnam-wide entity with a rate of 63.88 percent.

COMMENT 8: SOUTH VINA

A. BONA FIDE SALES

South Vina argues that the Department should reverse its preliminary results wherein the Department found South Vina's sales non-bona fide because of high prices, low quantities and contradictory evidence relating to the U.S. customer. See Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Preliminary Rescission of New Shipper Review, 73 FR 43689 (July 28, 2008) ("Preliminary Rescission"). South Vina maintains that after considering the factors that affected the (1) price and (2) quantity of its subject sales, in addition to the explanation of the (3) U.S. customer, the Department should find South Vina's sales bona fide and, thus, should not rescind South Vina's new shipper review.

Price

South Vina argues that its high POR subject merchandise sales prices can be explained by five factors: (1) entered value; 2) net weight; 3) preservative; 4) grade; and 5) frozen form ("five price factors"). In addition, South Vina maintains that non-physical characteristics also contributed to the high prices.

With regard to entered value, South Vina argues that international freight should be deducted from South Vina's cost and freight ("CFR") price in order to make South Vina's sales prices free on board ("FOB") because, South Vina claims, the Customs and Border Protection ("CBP") import data is on an FOB basis. South Vina claims that broker error resulted in its entries being valued at the higher CFR prices. With regard to net weight, South Vina argues that, based on the importer's experience, most CBP subject entries are for higher glazed (i.e., less expensive) product. According to South Vina's importer, this glazing can typically be upwards of 20%. With regard to preservative, South Vina claims that it did not use preservatives and/or "plumping agents" for its U.S. subject sales (per a verbal agreement) as there is no request for preservatives in the sales contract. South Vina maintains that its subject sales were for unsoaked (i.e., more expensive fillets). With regard to grade, South Vina explained that the subject sales involved "the best of the best" Grade I (highest grade) product per the customer's request, and that these hand-picked fillets command a higher price. With regard to frozen form, South Vina argues that that individually quick frozen ("IQF") fish fillets command a higher price due to the packaging type, as these types of fillets require more packaging (bigger boxes and use of poly bags) and cost more to transport, on a per unit basis, than block/shatterpack form. In addition, South Vina's importer speculates that about half of all exports to the United States are IQF and half are in block form. With regard to non-physical characteristics, South Vina argues that its size/cost structure is such that it must charge a higher price. South Vina states that larger exporters charge lower prices simply because they are selling more products.

Quantity

South Vina argues that because IQF is less dense than in block form, less can fit into an ocean container. South Vina claims that due to the IQF packaging and the superior quality (Grade I), the importer chose to protect its investment from possible damage by not overloading. South

Vina argues that the CBP data acquired by the Department shows numerous entries that shipped less than South Vina.

U.S. Customer and Resale Profit

South Vina argues that the confusion over the U.S. customer can be explained as the U.S. importer is not related to South Vina, is one legal entity, and does business as (“DBA”) several entities, all of which are registered in the state of California. South Vina further argues that after clarifying the identity of the U.S. customer, information on the record shows that the U.S. customer resold the merchandise at a profit.

South Vina argues that the U.S. customer that purchased South Vina’s U.S. sales of subject merchandise during the POR was an importer DBA for another entity. South Vina’s importer maintains that these various DBAs are not separate legal entities, but are simply other names used by the importer. Thus, South Vina’s importer argues that technically, the legal purchaser of South Vina’s fish fillets was the importer and not one of its DBAs, and, accordingly, there is no discrepancy on the record. South Vina argues that it is not aware of any inconsistencies between South Vina’s sales documentation and the importer’s documentation with regard to the names used. According to South Vina, what is important is the legal entity which purchased South Vina’s product, and not how that legal entity conducts its own internal business using the various “DBA” names. Therefore, South Vina explains that it legally sold the merchandise to the importer and the importer in turn legally sold the merchandise to an affiliated (*i.e.*, identical ownership) customer, who subsequently sold the merchandise to an unaffiliated U.S. customer.

South Vina’s importer argues that it sold the subject merchandise during the POR to its affiliated grocery store, who in turn sold to retail customers at a profit. South Vina’s importer maintains that due to the millions of retail sales transactions per year, it is not grocery store industry practice to maintain sales documentation or records of individual transactions with unaffiliated customers, and that the grocery store does not maintain such documentation or records. South Vina’s importer argues that although it is unable to provide individual transactions with unaffiliated customers, it has provided some of its own and competing store contemporaneous receipts showing that it sells at comparable/market rates. South Vina’s importer argues that it is readily apparent that the affiliated grocery store resells the subject merchandise in the normal course of trade and at normal prices based on competition in the San Gabriel, California market. Moreover, South Vina’s importer argues that its prices reflect a significant profit over the CFR sales price from South Vina. Finally, South Vina argues that the Department’s verification report does not dispute any of the above arguments.

Petitioners argue that South Vina’s arguments should be rejected, and the Department should rescind South Vina’s review for the final results, because its: (1) price arguments lack record evidence; (2) quantities were not commercially reasonable; and (3) profit arguments lack record evidence.²¹

²¹ In its case brief, South Vina made two statements representing untimely submitted new factual information regarding shipment quantity and the undersigned counsel’s experience and the supposed practice of vendors in selling short weighted/glazed products. Therefore, we have not considered these statements for the final results.

Price

With regard to the five price factors, Petitioners argue that South Vina's arguments depend on speculation and suppositions regarding the types of products reflected in the CBP data. Petitioners maintain that although the record contains evidence of the types of products that South Vina sold, it is devoid of any evidence of the alleged differences in the types and quality of merchandise reflected throughout the CBP data.

With regard to net weight, Petitioners argue that South Vina's statements and solicitations/price quotes do not demonstrate that the vast majority of Vietnamese exporters sell their frozen fish fillets on an 80-90 percent short weight basis. Petitioners maintain that nothing on the record supports South Vina's unsubstantiated contention. With regard to preservative, Petitioners argue that South Vina's claim that "most other entries" under the HTSUS subheading were soaked with preservatives is speculative and unsupported by record evidence. With regard to grade, Petitioners argue that South Vina cites no record evidence to support its claim of color grades that Vietnamese exporters generally ship to the United States. Moreover, Petitioners state color grade is not one of the Department's physical product characteristics for purposes of this antidumping duty proceeding. With regard to frozen form, Petitioners argue that South Vina cites to no record support for its claim that block/shatterpacks are denser than IQF packing or for its claims that (1) Vietnamese exporters generally export subject merchandise shatterpacks rather than by IQF packing and, thus, South Vina exported less product in its containers than the norm, and (2) Vietnamese exporters tend to overpack their containers, whereas South Vina did not. With regard to entered value, Petitioners argue that South Vina does not cite any record evidence regarding the bases on which all other Vietnamese exporters reported their entered values. In addition, Petitioners argue that the Department should refuse to accept a self-serving argument from South Vina that a value that South Vina reported to CBP should not be used by the Department when South Vina itself declared that value to CBP.

With regard to South Vina's ranking in the CBP data, Petitioners argue that the weighted-average unit value ("AUV") of all the entries of subject merchandise during the POR represents typical market prices for the market as a whole. For proprietary details, please see Bona Fide Nature of the Sales in the Antidumping Duty New Shipper Review of Certain Frozen Fish Fillets: Southern Fishery Industries Co., Ltd. ("South Vina"), dated July 22, 2008 ("South Vina Bona Fide Sales Memo"). However, Petitioners argue that South Vina's AUVs were higher than this average. Moreover, Petitioners argue that South Vina's entries had a high percentile ranking on a value basis for the POR entries under the same HTSUS subheading. Id. Therefore, Petitioners argue that South Vina's subject sales represented atypical market prices for the market as a whole and, thus, are not reflective of normal commercial considerations.

With regard to non-physical characteristics, Petitioners argue that South Vina's claims regarding these supposed non-physical differences are unsubstantiated by any evidence and that South Vina fails to state which non-physical attributes apply to its sales versus sales of other Vietnamese exporters. Thus, Petitioners argue, the Department cannot undertake any actual analysis or draw any meaningful conclusions about the relevance or existence of non-physical attributes vis-à-vis South Vina's prices during the POR.

Quantity

Petitioners argue that the average quantity of all the entries of subject merchandise during the POR (under the same HTSUS subheading as South Vina's entries) represents typical market quantities for the market as a whole. For proprietary details, please see South Vina Bona Fide Sales Memo. However, Petitioners argue that South Vina's quantities were lower than this average and that South Vina's entries had a low percentile ranking on a quantity basis for the POR entries under the same HTSUS subheading. Id. Therefore, Petitioners argue that South Vina's subject sales represented atypical quantities for the market as a whole and, thus, are not reflective of normal commercial considerations.

U.S. Customer

Petitioners argue that South Vina provides no record evidence to support its contention and that it merely cites photographs showing the prices of "essentially equivalent" frozen fish fillets sold in supermarkets and grocery stores in August 2008. Petitioners argue that South Vina failed to place on the record any documentation to demonstrate the prices at which the first unaffiliated U.S. customer resold the subject merchandise purchased from South Vina, which, Petitioners claim, is a critical component of the profit analysis the Department must take into account along with the various costs and expenses incurred by the customer. Furthermore, Petitioners argue that South Vina failed to provide documentation regarding the movement and selling expenses that its customer incurred in reselling the subject merchandise. Thus, Petitioners maintain, the record contains insufficient evidence for the Department to conclude that South Vina's customer resold the subject merchandise for a profit.

Finally, Petitioners argue that the verification report neither overcomes South Vina's failure to provide actual evidence upon which the Department can draw any meaningful conclusions regarding the types of products contained in the CBP data nor does it contain any evidence of whether South Vina's customer resold the subject merchandise for a profit.

Department's Position:

In determining whether a sale is a bona fide commercial transaction, the Department examines the totality of the circumstances of the sale in question. If the weight of the evidence indicates that "the transaction has been so artificially structured as to be commercially unreasonable," the Department finds that it is not a bona fide commercial transaction and must be excluded from review. See Certain Cut-to-Length Carbon Steel Plate From Romania: Notice of Rescission of Antidumping Duty Administrative Review, 63 FR 47232, 47234 (September 4, 1998). The U.S. Court of International Trade has agreed that where a transaction is an orchestrated scheme involving artificially high prices, the Department may disregard the sale as not resulting from a bona fide transaction. See Chang Tieh Industry Co., Ltd. v. United States, 840 F. Supp. 141, 146 (CIT 1993).

In determining whether a U.S. sale in the context of a new shipper review is a bona fide transaction, the Department considers numerous factors, with no single factor being dispositive, in order to assess the totality of the circumstances surrounding the sale in question. See Certain Preserved Mushrooms From the People's Republic of China: Final Results and Partial

Rescission of the New Shipper Review and Final Results and Partial Rescission of the Third Antidumping Duty Administrative Review, 68 FR 41304 (July 11, 2003) (“Mushrooms from China”) and accompanying Issues and Decision Memorandum at Comment 2. Consistent with these principles, the Department normally considers factors such as, inter alia, (1) the timing of the sale, (2) the sale price and quantity, (3) the expenses arising from the sales transaction, (4) whether the sale was sold to the customer at a loss, and (5) whether the sales transaction between the exporter and customer was executed at arm’s length. See American Silicon Technologies v. United States, 110 F. Supp. 2d 992, 996 (CIT 2000); Tianjin Tiancheng Pharmaceutical Co., Ltd. v. United States, 366 F. Supp. 2d 1246, 1250 (CIT 2005) (“TTPC”). Therefore, the Department considers a number of factors in its bona fide analysis, “all of which may speak to the commercial realities surrounding an alleged sales of subject merchandise.” See Hebei New Donghua Amino Acid Co., Ltd. v. United States, 374 F. Supp. 2d 1333, 1341 (CIT 2005) (“New Donghua”).

Although some bona fide issues may share commonalities across various Department cases, the Department examines the bona fide nature of a sale on a case-by-case basis, and the analysis may vary with the facts surrounding each sale. See New Donghua, 374 F. Supp. 2d at 1340, citing Mushrooms from China at Comment 2. In TTPC, the court affirmed the Department’s practice of considering that “any factor which indicates that the sales under consideration is not likely to be typical of those which the producer will make in the future is relevant,” (see TTPC, 366 F. Supp. 2d at 1250, citing Windmill Int’l Pte., Ltd. v. United States, 193 F. Supp. 2d 1303, 1307 (CIT 2002)), and found that “the weight given to each factor investigated will depend on the circumstances surrounding the sales.” See TTPC, 366 F. Supp. 2d at 1263. The Court stated that the Department’s practice makes clear that the Department is highly likely to examine objective, verifiable factors to ensure that a sale is not being made to circumvent an antidumping duty order, therefore, a respondent is on notice that it is unlikely to establish the bona fides of a sale merely by claiming to have sold in a manner representative of its future commercial practice. See New Donghua, 374 F. Supp. 2d at 1339.

As discussed below, we conclude that South Vina’s sales were bona fide transactions. That is, we find that, given the totality of circumstances, these were bona fide commercial transactions because they were consistent with normal business practices and were otherwise commercially reasonable.

First, we note that no party challenged the Department’s preliminary findings that (1) the timing of the sale, (2) expenses arising from the transaction, and (3) whether the transactions were made on an arm’s-length basis, were indicators that South Vina’s sales were bona fide.

Price

We agree with Petitioners that South Vina’s price was higher when compared to the averages of CBP import data whether the price is inclusive of freight or not. Nonetheless, we observe that South Vina’s price does not appear to be an outlier when compared to other prices evidenced in the CBP data. Specifically, when all the entries are grouped by manufacturer, South Vina’s price is not so different from the prices right below it. In other words, the CBP data shows a gradual curve of prices, not a sharp curve separating South Vina’s price from the other prices from CBP. See Memorandum to the File from Javier Barrientos, Case Analyst, Final Analysis Memorandum, dated March 9, 2009, at Attachment II (“South Vina Final Analysis Memo”).

This gradual curve of pricing leads us to conclude that pricing during the POR ranged significantly such that South Vina's prices are not so high as to conclude that they are atypical.

Given this pricing pattern in the CBP data, we have not considered whether South Vina's prices were caused by the physical characteristics as South Vina proposes because South Vina provided no documentary evidence as to the make-up of the exports of other Vietnamese fish processors/exporters or other U.S. importers in the CBP data. Moreover, there is no information on the record on how a company's size has any bearing on establishment of its sales price.

Therefore, in the absence of any other information which might call into question the price South Vina charged, we do not find that South Vina's sales price during the POR was so high such that we would conclude that South Vina's sales were not bona fide transactions.

Quantity

We observe that South Vina's volumes do not appear to be outliers when compared to other sales volumes evidenced in the CBP data. Specifically, when all the entries are grouped by manufacturer, South Vina's volumes are not so different from the volumes of multiple companies who also shipped during the POR. See South Vina's Final Analysis Memo at Attachment II. Therefore, in the absence of other information, we do not find that South Vina's sales volumes during the POR were so low such that we would conclude that South Vina's sales were not bona fide transactions.

U.S. Customer

In the preliminary rescission, the Department stated that there exists on the record contradictory information with regard to the U.S. customer and whether the subject merchandise was resold at a profit. See Preliminary Rescission at 43690. Specifically, we found that there was contradictory evidence on the record as to whether the U.S. customer resold the subject merchandise at a profit as the importer questionnaire response narrative indicated that one DBA made a resale profit when it sold the subject merchandise to another DBA. See South Vina Bona Fide Memo at 5. However, we noted that a certain exhibit in a supplemental questionnaire response showed that the resale was between two other entities, albeit affiliated entities. Id. Therefore, we stated that the record contains inconsistent evidence establishing that a profit was made on resale of the subject merchandise in the United States. The Department, however, stated that it intended to provide South Vina with a final opportunity to clarify the conflicting information on the record of this review. See Preliminary Rescission at 43690.

In a separate questionnaire response, South Vina clarified that: (1) South Vina sold the merchandise to the importer under one of its DBAs; (2) this same importer, under another of its DBAs, sold the merchandise to its affiliated grocery store; and, (3) this grocery store sold the merchandise to the first unaffiliated U.S. customer (i.e., walk-in customers). See South Vina's August 13, 2008, questionnaire response at 13-14.

However, even though South Vina's importer has clarified the transaction chain, it stated that its affiliated grocery store was unable to provide direct evidence from the POR of the multitude of unaffiliated transactions (i.e., walk-in customers) as it does not keep these records in the normal course of business. Id. Therefore, we are unable to determine, based on the information on the record, whether the merchandise was resold at a profit.

Conclusion

In this case, based on the totality of the circumstances discussed above, the Department finds that the new shipper review sales made by South Vina during the POR were bona fide.

A. FREIGHT DISTANCE FOR CERTAIN CHEMICALS

Petitioners argue that they have identified errors contained in a post-preliminary results calculation related to the valuation of two chemicals used during processing which South Vina sourced from a market-economy country. Petitioners argue that although the programming language is correct, South Vina incorrectly reported its freight distance for these two chemicals. Petitioners maintain that the Department should revise the margin calculation program to include the freight cap as a surrogate freight distance for these two chemicals. Petitioners allege that the Department noted that the freight distance was the distance to the Ho Chi Minh City port and, thus, the revised programming language should include this distance.

South Vina argues that these certain chemicals were delivered to a port much closer than this port used by the Department in the Preliminary Results and that any truck freight added should be from that port only.

Department's Position:

In the post-preliminary calculation margin for South Vina, the Department inadvertently did not add inland freight to certain market economy purchases delivered to port. See New Shipper Review of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Post-Preliminary Results Analysis for Southern Fishery Industries Co., Ltd. ("South Vina") dated January 13, 2009. Therefore, we agree with Petitioners that the Department should add inland freight to certain chemical purchases. However, we also agree with South Vina that the distance used should be based on distance between South Vina and the port receiving the merchandise. Therefore, for these final results we will add a freight distance to the market economy purchases between South Vina and the delivery port.

B. TOTAL MATERIALS COST FOR CERTAIN CHEMICALS

Petitioners also argue that the Department erred in the calculation of the total material costs for these two chemicals. Petitioners argue that the Department intended to multiply the respective FOP by the sum of the market economy input price plus the cost of freight. However, Petitioners maintain that the amounts that South Vina reported in the fields at issue actually represent the total value of the material purchases – that is, the purchase price multiplied by the FOP. Thus, Petitioners argue that the Department incorrectly multiplied the FOP by an amount that already incorporated the factor of production and that the Department should substitute the actual market-economy prices for these two variables.

South Vina did not submit comments on this issue.

Department's Position:

We agree with Petitioners and will modify the total material costs for these two chemicals as proposed by Petitioners.

COMMENT 9: BINH AN

A. BONA FIDE SALES

Petitioners argue that the Department should rescind the review for Binh An because its POR sales were (1) of atypical values when compared to U.S. imports, (2) atypical volumes when compared to U.S. import quantities and (3) because there is no record evidence that the U.S. customer resold the imported product at a profit. According to Petitioners, the totality of the circumstances demonstrated that Binh An did not make any bona fide sales during the POR. Therefore, the Department should rescind this new shipper review with respect to Binh An.²²

Binh An argues that when examining the factors of a bona fide analysis: (1) timing of the sale, (2) expenses arising from the transaction, (3) whether the transaction was made on an arm's length basis, (4) whether the goods were resold at a profit, and (5) price and quantity of the sales, Binh An's sales during the POR were bona fide.

First, Binh An argues that (1) timing of the sale and (2) the expenses arising from the transaction and (3) whether the transaction was made on an arm's length basis were not raised by Petitioners and therefore, the Department's preliminary finding with respect to these factors as being indicators of non-bona fide sales should remain unchanged in these final results.

With respect to sales value, Binh An argues that although the value used by the Department was found to be commercially reasonable, the Department found at verification that its values were inclusive of international freight, instead of being based on FOB values. As such, the correct values are actually lower than those found acceptable in the Preliminary Results. Moreover, this revised value places Binh An's values well below the AUV of several shipments of other Vietnamese exporters. In addition, Binh An argues that the entire concept of AUV to AUV comparison is problematic in the present case because product variations may cause price differences. In conclusion, Binh An argues that the Department should find that its sales were bona fide transactions.

Binh An argues that its sales volumes were not low when compared to other U.S. imports during the POR. Binh An disagrees with Petitioners' methodology which compares individual transactions/sales rather than an aggregate amount of all POR products sold by Binh An. Binh An argues that during the POR Binh An sold over 60,000 pounds of subject merchandise and when compared to U.S. imports, this amount is not unreasonable or atypically low.

²² Due to the business proprietary nature of the arguments only a limited summary is provided here. A full, detailed discussion is available within Petitioners' February 3, 2009 case brief at pages 35-41.

Binh An argues that its fish fillets were sold at a profit and that record evidence support this statement. Citing its August 15, 2008 questionnaire responses and exhibits, Binh An notes that there is sufficient evidence to show that the difference between its U.S. customers' purchase and import costs and its resale prices was between \$0.29 to \$0.39, per pound. Moreover, Binh An argues that the product was imported into the port of Long Beach and the U.S. customer's resale locations were in the Los Angeles area – meaning the in-land freight costs were necessarily low. Finally, Binh An argues that the U.S. customer is a grocery store and therefore, transaction costs are low.

Department's Position:

For the Department's standards and criteria for conducting bona fide analyses, please refer to Comment 8A above.

As discussed below, we conclude that Binh An's sales were bona fide transactions. That is, we find that, given the totality of circumstances, these were bona fide commercial transactions because they were consistent with normal business practices and were otherwise commercially reasonable.

First, we agree with Binh An that no party challenged the Department's preliminary finding that (1) timing of the sale, (2) expenses arising from the transaction, and (3) whether the transactions were made on an arm's-length basis, were not indicators that Binh An's sales were not bona fide. Therefore, we have adopted our preliminary analysis on such criteria for the final results.

Price

We agree with Petitioners that Binh An's price was higher when compared to the averages of CBP import data whether the price is inclusive of freight or not. Nonetheless, we observe that Binh An's price does not appear to be an outlier when compared to other prices evidenced in the CBP data. Specifically, when all the entries are grouped by manufacturer, Binh An's price is not so different from the prices right below it. In other words, the CBP data shows a gradual curve of prices, not a sharp curve showing a drastic drop separating Binh An's price from the other prices from CBP. See Memorandum to the File from Javier Barrientos, Case Analyst, Binh An Final Analysis Memo, dated March 9, 2009, at Attachment II ("Binh An Final Analysis Memo"). This gradual curve of pricing leads us to conclude that pricing during the POR ranged significantly such that Binh An's prices are not so high as to conclude that they are atypical.

Given this pricing pattern in the CBP data, we have not considered whether Binh An's prices were caused by the product's physical characteristics as Binh An proposes because it provided no documentary evidence as to the make-up of the exports of other Vietnamese fish processors/exporters or other U.S. importers in the CBP data. Therefore, in the absence of any other information, we do not find that Binh An's sales price during the POR was so high such that we would conclude that South Vina's sales are were not bona fide transactions.

Quantity

We observe that Binh An's volumes do not appear to be outliers when compared to other sales

volumes evidenced in the CBP data. Specifically, when all the entries are grouped by manufacturer, Binh An's volumes are not so different from the volumes of multiple companies which also shipped during the POR. See South Vina's Analysis Memo at Attachment II. Therefore, in the absence of other information, we do not find that Binh An's sales volumes during the POR were so low such that we would conclude that Binh An's sales were not bona fide transactions.

Resold at Profit

In the Preliminary Results, the Department stated that there was some information suggesting that Binh An's importer resold the product at a profit. This was based on Binh An's and its importer's responses to a questionnaire on this issue. Binh An provided the invoices from its importer to an affiliated entity, however, this does not show whether the affiliated entity resold the merchandise at a profit. The unaffiliated entity in this case was a grocery store. Although Binh An's unaffiliated U.S. customer, the grocery store, made an effort to provide the information, only non-contemporaneous information could be provided. See Binh An's August 15, 2008 Questionnaire Response at Exhibit 2. Therefore, we are unable to determine based on information in the record, whether the merchandise was resold at a profit.

Conclusion

In this case, based on the totality of the circumstances discussed above, the Department finds that the new shipper review sales made by Binh An during the POR were bona fide.

B. INTERNATIONAL FREIGHT

Petitioners argue that the Department should apply a surrogate value for Binh An's ocean freight services because at verification the Department discovered that Binh An contracted ocean freight services with a Vietnamese freight forwarder and paid for ocean freight in Vietnamese Dong. See Memorandum to the File from Javier Barrientos and Matthew Renkey, Case Analysts, Verification of Sales and Factors of Production Responses of Binh An Join Stock Company in the Antidumping Duty, New Shipper Review of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, dated December 9, 2008 ("Binh An Verification Report") at 2, 12. Petitioners propose applying either the highest Indian value for international freight on the record or derive an international freight value by dividing the Apex financial statements total freight and forwarding expenses by total quantity of shrimp and fish sold as AFA for this verification failure.

Binh An did not submit comments on this issue.

Department's Position:

Section 776(a)(2) of the Act provides that if an interested party: (A) withholds information that has been requested by the Department; (B) fails to provide such information in a timely manner or in the form or manner requested, subject to subsections 782(c)(1) and (e) of the Act; (C)

significantly impedes a determination under the antidumping statute; or (D) provides such information but the information cannot be verified, the Department shall, subject to subsection 782(d) of the Act, use facts otherwise available in reaching the applicable determination. From September 17-19, 2008, the Department conducted the verification of Binh An's questionnaire

responses in Can Tho City, Vietnam. At verification we found that Binh An's claim that it purchased its ocean freight services from a market economy supplier and paid in a market economy currency could not be verified. In fact, the Department found that Binh An did not pay for the ocean freight in a market economy currency, but rather Vietnamese Dong. Therefore,

facts available are appropriate because Binh An provided information on its purchases of international freight that could not be verified. In addition, section 776(b) of the Act provides that, if the Department finds that an interested party "has failed to cooperate by not acting to the best of its ability to comply with a request for information," the Department may use information that is adverse to the interests of that party as facts otherwise available.

The Department finds that in selecting from among the facts available, an adverse inference is appropriate, as Binh An failed to provide accurate, verifiable information that is within Binh An's possession. Binh An has not claimed that it could not have provided the correct response to the Department's request for information. Accordingly, we find that Binh An failed to cooperate to the best of its ability. Adverse inferences are appropriate "to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully." See SAA at 870. Furthermore, "affirmative evidence of bad faith on the part of the respondent is not required before the Department may make an adverse inference." See Antidumping Countervailing Duties; Final rule, 62 FR 27296, 27340 (May 19, 1997).

An adverse inference may include reliance on information derived from the Petition, the final determination in the investigation, any previous review, or any other information placed on the record. See Section 776(b) of the Act. We are using a surrogate value for international freight taken from Apex, a Bangladeshi seafood processor which is also being used for financial ratios to value the international freight expenses incurred by Binh An. See Binh An's Analysis Memo at 2. Although this is not secondary information, we find it to be reasonable because it is from an audited financial statement from a contemporaneous period of a Bangladeshi seafood processor from the surrogate country that produced fish and shrimp products.

C. DIESEL

Petitioners argue that the Department should apply AFA to Binh An's diesel consumption because Binh An failed to report that it used diesel in the production of fish fillets. According to Petitioners, the Department discovered, for the first time at verification, that Binh An used diesel to produce the subject merchandise. See Binh An Verification Report at 2, 16. As AFA, Petitioners propose using the diesel consumption observations from verification (i.e., highest usage month during the POR) multiplied by the 12 months of the POR. Id.

Department's Position:

Section 776(a)(2) of the Act provides that if an interested party: (A) withholds information that has been requested by the Department; (B) fails to provide such information in a timely manner

or in the form or manner requested, subject to subsections 782(c)(1) and (e) of the Act; (C) significantly impedes a determination under the antidumping statute; or (D) provides such

information but the information cannot be verified, the Department shall, subject to subsection 782(d) of the Act, use facts otherwise available in reaching the applicable determination. Department discovered at verification, for the first time, that Binh An used diesel fuel as an energy input in the production of subject merchandise. Therefore, facts available are appropriate because Binh An failed to provide a FOP during the POR. In addition, section 776(b) of the Act provides that, if the Department finds that an interested party “has failed to cooperate by not acting to the best of its ability to comply with a request for information,” the Department may

use information that is adverse to the interests of that party as facts otherwise available. Therefore, pursuant to section 776(b) of the Act, the Department finds that in selecting from among the facts available, an adverse inference is appropriate, as Binh An failed to cooperate to the best of its ability by not providing the diesel fuel used during the POR. This was information that Binh An had in its control in preparing the questionnaire responses, but failed to report as an energy input used to produce subject merchandise. Adverse inferences are appropriate “to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.” See SAA at 870. Furthermore, “affirmative evidence of bad faith on the part of the respondent is not required before the Department may make an adverse inference.” See Antidumping Countervailing Duties: Final rule, 62 FR at 27340.

An adverse inference may include reliance on information derived from the Petition, the final determination in the investigation, any previous review, or any other information placed on the record. See Section 776(b) of the Act. Although this is not secondary information, we find it to be reasonable because this figure was collected at verification which is Binh An’s own data.

D. ELECTRICITY

Petitioners argue that the Department should apply AFA to Binh An’s electricity consumption because the Department found at verification that electricity for one month of the POR was omitted from Binh An’s reported figure. See Binh An Verification Report at 16. As AFA, Petitioners propose using the consumption figure from the month with the highest reported amount of electricity consumed multiplied by twelve (number of months in POR) to arrive at a POR consumption amount.

Binh An did not submit comments on this issue.

Department’s Position:

Section 776(a)(2) of the Act provides that if an interested party: (A) withholds information that has been requested by the Department; (B) fails to provide such information in a timely manner or in the form or manner requested, subject to subsections 782(c)(1) and (e) of the Act; (C) significantly impedes a determination under the antidumping statute; or (D) provides such information but the information cannot be verified, the Department shall, subject to subsection 782(d) of the Act, use facts otherwise available in reaching the applicable determination. Therefore, facts available are appropriate because Binh An failed to report its electricity usage for one month during the POR. In addition, section 776(b) of the Act provides that, if the Department finds that an interested party “has failed to cooperate by not acting to the best of its

ability to comply with a request for information,” the Department may use information that is adverse to the interests of that party as facts otherwise available.

The Department finds that in selecting from among the facts available, an adverse inference is appropriate, as Binh An failed to cooperate to the best of its ability by not providing all the electricity consumed during the POR and because it failed to report it or submit this information, despite the fact that the information is within Binh An’s possession. Adverse inferences are appropriate “to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.” See SAA at 870. Furthermore, “affirmative evidence of bad faith on the part of the respondent is not required before the Department may make an adverse inference.” See Antidumping Countervailing Duties; Final rule, 62 FR at 27340.

An adverse inference may include reliance on information derived from the Petition, the final determination in the investigation, any previous review, or any other information placed on the record. See Section 776(b) of the Act. We are using the highest electricity consumption figure for one month collected at verification in place of the omitted month to get the electricity consumption during the POR. See Binh An’s Final Analysis Memo at 2. Although this is not secondary information, we find it to be reasonable because we are using the electricity consumption figures based on Binh An’s own data.

RECOMMENDATION:

Based on our analysis of the comments received, we recommend adopting all of the above changes and positions, and adjusting the margin calculation programs accordingly. If accepted, we will publish the final results of this review and the final weighted-average dumping margins in the Federal Register.

AGREE _____

DISAGREE _____

Ronald K. Lorentzen
Acting Assistant Secretary
for Import Administration

Date